Supreme Court, U.S.
FILED

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No. 97-

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In The

Supreme Court of the United States

October Term, 1997

DON RAY PHINNEY,

Petitioner,

vs.

FIRST AMERICAN NATIONAL BANK;
FIRST AMERICAN CORPORATION (TENN.);

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Don Ray Phinney, Petitioner
Pro se
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January 26, 1998

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not an attorney for the Respondent can become a Federal Judge, as Thomas A. Wiseman, Jr., did, and then try Respondent's case in the same year while owning stocks and holding a $58,000 loan with the Respondent at the time of trial, making no disclosure pre-trial regarding any of these facts, thus granting a J.N.O.V. motion against the Petitioner after a unanimous jury had found fraud, forgery and perjury against the Respondent and returning a judgment verdict award in the amount of $1.25 million in Petitioner's favor.

2. Whether or not that same Federal Judge, after granting a J.N.O.V. motion in favor of the Respondent, can then continue to use the Federal bench at his disposal to commit fraud, perjury and obstruction of justice and then bribe Circuit Executive James A. Higgins and U.S. Supreme Court Clerk Kathy Tyrcz to cover up these illegal activities and the real merits of the case from the Sixth Circuit and the Supreme Court of the United States.

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CONSTITUTIONAL PROVISIONS

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Don Ray Phinney, does petition for a writ of certiorari to issue to review an opinion of the Sixth Circuit which blocks the Petitioner from exposing the corrupt activities of the Respondents and United States District Court Judge Thomas A. Wiseman, Jr.

The case below involved whether or not United States District Court Judge John G. Davies, in his most recent ruling on August 6, 1993, time-barred Petitioner's case, which Judge Davies' Order did not do. However, United States District Court Judge Robert L. Echols ruled on April 2, 1996, and July 30, 1996, that Judge Davies did in fact time-bar Petitioner's case in his most recent ruling, thus preventing the case from going to trial. The Respondents are responsible for causing the corrupt rulings of Judge Echols.

♦

OPINIONS BELOW

The Order of the Sixth Circuit was rendered on October 29, 1997, and is "Not Recommended for Full-Text Publication", See Appendix D. The Order of the District Court was issued on August 6, 1993. See Appendix 1. The Memorandum and Order of the District Court was issued on April 2, 1996. See Appendix B. The Memorandum opinion and Order of the District Court was issued on May 8, 1997. The Order of the Sixth Circuit was issued on

March 28, 1997. The Memorandum and Order of the District Court was issued on July 30, 1996.

♦

JURISDICTION

The date on which the United States Court of Appeals decided my case was October 29, 1997. The Supreme Court jurisdiction is invoked under 28 U.S.C., § 1254(1).

This petition was filed within (90) days of the opinion appealed from in the Sixth Circuit. No petition for rehearing was filed in the appellate court.

♦

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section One:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws.

♦

STATEMENT OF THE CASE

This case involves the Petitioner being illegally extradited from Los Angeles, California, to Nashville, Tennessee, by First American National Bank of Nashville, Tennessee. Petitioner had never been arrested before and was found innocent of the charges, which were five bad checks totally $1,050.00. Petitioner filed suit in Los Angeles, California, but the case was transferred to Nashville Federal Court.

Petitioner had previously signed a 7-year guaranteed $18,000,000 contract package deal with Raymond Katz Enterprises, Ltd., that was canceled six months after the signing, thus ruining Petitioner's singing career because of a mistake made by the Respondents.

Raymond Katz Enterprises had obtained an RCA Victor Records multi-album recording contract for Petitioner. Katz and RCA had spent a lot of money over six months making Petitioner's first album to be released worldwide, and Petitioner was unable to promote the album as Katz and RCA ha arranged. Therefore, Petitioner was destroyed from working in the entertainment world forever.

Thereafter, the Respondents bribed Katz not to represent Petitioner but to represent Respondent's country music recording artist instead of representing the Petitioner in rock and roll. In other words, unknowns such as Mac Davis, Dolly Parton and many others became super-stars in the entertainment world instead of Petitioner. Respondents bribed RCA to pull Petitioner's single record release that became a hit

record in the RCA test market while Petitioner was in custody. Respondents obtained the law offices of Bass, Berry & Sims to represent them because RCA Corp. was a client of that law firm.

This case was commenced by the filing and service of a complaint on August 12, 1992, in the U.S. District Court in Los Angeles (No. 92-4823 JGD), under violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, embodied in 18 U.S.C., § 1962-1967. Defendants moved to dismiss on the basis of lack of personal jurisdiction, venue, that the complaint was time-barred on its face and that the RICO action was improperly pled. On December 17, 1992, a written order dismissing the case was filed, which Plaintiff moved that court to reconsider. On August 6, 1993, an Order Granting In Part and Denying In Part Plaintiff's Motion for Reconsideration was filed, the court ruling that Plaintiff's suit was not time-barred on its face, but that jurisdiction and venue did not lie in California.

The California suit was dismissed without prejudice and the court instructed Plaintiff to re-file his suit in Tennessee, where Defendants are located. The defendant corporation owns the defendant bank. On August 6, 1993, Judge John G. Davies, in his most recent ruling, stated as follows: Page 3, lines 21 through 23 of Judge Davies' Order of August 6, 1993.

"The statute of limitations for civil RICO claims is four years. Agency Holding Corporation v. Malley-Duff & Assocs., 107 S.Ct. 2759, 2767 (1987).

Page 4, line 18 through line 22.

"The Complaint states that the FBI 'late in 1988 provided Phinney with approximately 40 pieces of new evidence relating to the matters in suit.' Complaint at 10:10-11. If Phinney learned of the fraud then, it would be within four years of filing the complaint."

Page 5, lines 2 through 9

"Conclusion. For the reasons stated above, the Court HEREBY GRANTS IN PART AND DENIES IN PART Plaintiff's motion for reconsideration. The Motion is denied, except that the prior Order to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6) is HEREBY AMENDED to show (1) that the complaint is not time-barred on its face and (2) that the dismissal is without prejudice."

Page 5, lines 25 through 27.

"In their opposition to the motion for reconsideration, Defendants requested that the Court impose sanctions on Phinney and his attorney for filing the motion. Because Phinney brought relevant facts to the Court's attention, sanctions are not warranted."

Plaintiff then filed suit and service on August 3, 1994, in the United States District Court in Nashville, Tennessee (No. 3:94-0639), Judge Echols. Judge Echols ruled on February 27, 1995, that all pre-trial matters, including, but not limited to, entry of a scheduling order and pre-trial order, and the holding of any necessary pre-trial conferences or hearings were referred to Magistrate Judge Juliet Griffin, who

was employed as a law clerk to Judge Thomas A. Wiseman, Jr., from 1978-1980, which was when the Plaintiff won the $1.25 million jury award and Judge Wiseman granted a J.N.O.V. motion for the defendant. [Plaintiff later learned on February 23, 1996, that Judge Echols' wife has two accounts with the defendant and Judge Echols mother-in-law also has two accounts with the defendant.]

On April 28, 1995, Plaintiff filed the RICO Statement per the Court's instructions. On April 28, 1995, Plaintiff also filed a Discovery Statement. On August 31, 1995, Defendant filed for summary judgment and began sending documents to be considered served upon Plaintiff, for 7 months, regular mail to the wrong zip code. Some documents were never received by Plaintiff and some documents took six weeks to get to Plaintiff, which was after the Court had ruled ont the matter. Therefore, on April 2, 1996, the Court granted summary judgment for the Defendant stating that Plaintiff has failed to respond. Judge Echols also ruled on April 2, 1996, that "...the most recent ruling by the California District Court with respect to Plaintiff's claims clearly placed him on notice that his claims were frivolous." Page 11, lines 5 through 7, Appendix B. "...the California District Court in a well-reasoned opinion, stated that Plaintiff's RICO claim was clearly barred by the statute of limitations." Page 11, lines 9 through 11. "It is clear from the complaint that Plaintiff was aware of this claim, at the latest, by May 12, 1989. Thus construing the facts in the light most favorable to Plaintiff, the latest date that the RICO limitations period could have begun

to run was in 1989. As Plaintiff filed this complaint August 3, 1994, over four years later, Plaintiff's claims are clearly barred by the applicable statute of limitations. Accordingly, Defendant's motion for summary judgment is granted." Page 8, lines 7 through 14.

In other words, Plaintiff filed a copy of Judge Davies' Order of August 6, 1993, for Judge Echols to review, but Judge Echols lied in his April 2, 1996, Order about the "most recent ruling", by "the California District Court," which was the August 6, 1993, Order by Judge John G. Davies, in order to cover up the illegal activities of the Defendant and Judge Wiseman. On April 12, 1996, Plaintiff filed a motion to reconsider and for an extension of time regarding the summary judgment because Plaintiff's father died on April 9, 1996, and the Defendant had not properly served Plaintiff any documents for the seven months period regarding the summary judgment motion filed by the Defendant on July 30, 1996. Judge Echols denied the motion. Therefore, Plaintiff appealed that Order and Memorandum to the Sixth Circuit in a timely manner, but the Sixth Circuit remanded the case to the District Court and the District Court vacated the Order and Memorandum of July 30, 1996. Therefore, the final ruling by the Sixth Circuit was October 29, 1997, which is the ruling Petitioner has petitioned this Court to review together with the Judge Davies and Judge Echols rulings.

♦

REASONS FOR GRANTING THE WRIT

First, the main reason is that Petitioner has a right to equal justice under the law. In other words, Judge Davies' ruling on August 6, 1993, and Judge Echols' ruling on April 2, 1996, cannot both be right. Therefore, this Court must decide which judge is correct, because there is no other Court powerful enough to do it and because it is your job and responsibility to do your own housecleaning, if your house is dirty and your Clerk's Office has been bribed by the Respondent in this case. The evidence is located in the book entitled, "Transcripts of Records and File Copies of Briefs, 1984, Vol. 105, Case Nos. 83-2007 to 83-2015." If this Court receives this "Writ of Certiorari", it will know to look in this book, which this Court will find fraud and corruption like never in its history. This Court must be above reproach from any amount of money, power, bribes or any illegal activities of any kind, even in the Clerk's office. The Petitioner is not accusing any Justice at this Court of knowing anything about the illegal activity the Petitioner is about to expose, but this Court needs to take care of the business at hand.

As you can see, if you look at Case No. 83-2008 in the entitled book previously mentioned above, you will discover that there are two cases with the same number, 83-2008. The reason for this act, that is so far departed from the accepted and usual course of judicial proceedings, is because the Respondents bribed U.S. Supreme Court Clerk Kathy Tycrz to switch Case No. 83-2008, Don Ray Phinney vs. First American National Bank, with Case No. 83-2008, Mose Mathis and

Sidney Mathis vs. Luther Heywood. Petitioner was present when Ms. Tyrcz informed Petitioner that she was responsible for delivering the writ of certiorari to the chambers of all nine Justices, but someone took it off her cart and she never delivered the booklets as her job requires. Petitioner asked Ms. Tycrz did she report this corrupt activity to the Court, and Ms. Tycrz replied, "I do not want to get anyone in trouble." Petitioner believes Ms. Tycrz is the corrupt person herself or she would have reported this illegal activity to this Court.

Petitioner demanded to see Case No. 83-2008 in the book entitled above and noticed that under the black line below Case No. 83-2009, you can clearly view Case No. 83-2008. Petitioner noticed that the date of Case No. 83-2009 was May 18, 1984. Petitioner also noticed that Case No. 83-2007 was dated June 6, 1984, and that Case No. 83-2010 was dated June 8, 1984. In other words, the Mose Mathis and Sidney Mathis case was filed 19 days before Case No. 83-2007 and 21 days before Case No. 83-2010. Therefore, this is impossible, so Petitioner had his own phony book made by Kathy Tycrz unless Ms. Tycrz is telling the truth and someone else took it off her cart and they told Ms. Tycrz that they delivered Petitioner's writ of certiorari for her and, if that be the case, then why didn't she report the event and check herself that the Justices law clerks received Petitioner's writ of certiorari.

By a review of Petitioner's Appendices, this Court will understand why the cover-up continues to the present day. The FBI evidence viewed by Judge Davies was too compelling

not to grant Plaintiff's motion for reconsideration.

During Appellant's case involving Judge Wiseman's bribes with Appellee, James A. Higgins was the Circuit Executive for the Judicial Council of the Sixth Circuit. On July 24, 1987, Mr. Higgins withheld the evidence Appellant sent to Mr. Higgins to present to Judge Lively who requested copies of the stocks and loan that were important to prove the year was 1977, not 1971, regarding the $58,000 loan from Appellee to Judge Wiseman. Mr. Higgins also put Appellant's case under the wrong rules so it would appear the Appellant could not appeal to the Judicial Conference of the United States for review.

Furthermore, there should be no difference between two District Courts with conflicting rulings, State Courts or Appeals Courts. Any two Courts with conflicting rulings should be "settled by this Court".

♦

CONCLUSION

In conclusion, Petitioner is certain the Respondent will try and cover up this writ of certiorari just as it did in Case No. 83-2008, Phinney vs. First American, from the view of this Court and that only if the press or media tells this Court about this case will this Court even know Petitioner is here again because Judge Wiseman is still controlling the illegal activities in Nashville Federal Court, Circuit Executive James A. Higgins is still controlling the illegal activities at the Sixth

Circuit Clerk's Office, and U.S. Supreme Court Clerk Kathy Tycrz is still controlling the illegal activities at the Clerk's Office at the Supreme Court of the United States.

Respectfully submitted,

Don Ray Phinney

January 26, 1998

APPENDIX A

ENTERED CLOSED FILED Aug. 6, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON RAY PHINNEY, an individual,	) CASE NO. CV 92 4823 JGD
Plaintiff,	)
v.	) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR RECONSIDERATION
FIRST AMERICAN NATIONAL BANK; FIRST AMERICAN CORPORATION (TENN.); DOES 1-100, INCLUSIVE,	)
Defendants.	)

On May 11, 1993, Plaintiff filed a Motion for Reconsideration of the Court's prior Order to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(B)(2), 12(B)(3), and 12(B)(6). After review of the parties' written submissions, the Court HEREBY GRANTS IN PART and DENIES IN PART Plaintiff's Motion for Reconsideration. The Motion is DENIED, except that the Order is HEREBY Amended to show (1) that the complaint is not time-barred on its face and (2) that the dismissal is without prejudice.

Facts

On August 12, 1992, Plaintiff Don Ray Phinney ("Phinney") filed a complaint against Defendants First

American National Bank ("Bank") and First American Corporation (Tennessee) ("Corporation") for violations of RICO, 18 U.S.C. 1962-67. The Corporation owns the Bank. Phinney, who was pro se until the present motion, now has an attorney. Phinney filed this motion for reconsideration on May 11, 1993.

Phinney's complaint alleges the following facts. In 1968, Phinney lived in Nashville, hoping to become a music star. Phinney dealt with a branch of the Bank. Due to a mixup, Phinney bounced some checks. The Bank decided to prosecute even though Phinney had signed a promissory note for the balance owed on the checks before the checks bounced. Phinney was arrested in California while recording an album and extradited to Tennessee for trial. Phinney's arrest destroyed several career-making opportunities. Phinney was convicted, but his conviction was later overturned.

Phinney sued the Bank in federal district court in Tennessee. The Bank bribed the judge. Thus, although the jury returned a verdict in Phinney's favor, the judge granted a judgment n.o.v. Furthermore, the Bank submitted false documents to the Sixth Circuit, resulting in an affirmance of the trial court's decision. Phinney also alleges that the Bank has done other illegal acts to hinder his appeals, and that the Judge in his Sixth Circuit action lied about his connections with the bank.

Phinney alleges that late in 1988, he received new FBI evidence that prompted him to bring a suit against the bank. On August 12, 1991, Phinney filed a suit in this Court. On

June 8, 1992, the Court dismissed Phinney's suit without prejudice for failure to effect timely service of the summons and complaint.

On August 12, 1992, Phinney filed his suit. Phinney's suit was assigned to Judge Tevrizian. On September 24, 1992, Phinney's suit was reassigned to this Court. On September 21, 1992, Defendants filed a motion to dismiss under 12(b)(2), 12(b)(3) and 12 (b)(6). On October 16, 1992, the parties wrote a stipulation extending Phinney's time to answer the motion while he looked for a lawyer. On November 2, 1992, pro se, Phinney made a very short (6-page) opposition to this motion. The opposition cited just one case in support of Phinney's arguments. On December 22, 1992, this Court entered an Order granting Defendants' motion to dismiss ("Order") for the following reasons:

(a) the Court lacks personal jurisdiction over the Defendant First American Corporation;
(b) venue is improperly laid in the Central District;
(c) Phinney's claims are time-barred; and
(d) Phinney's RICO claims are improperly pled.

Discussion

Phinney has presented no new evidence or arguments which lead the Court to reconsider its findings as to personal jurisdiction, venue, or improper pleading. However, Phinney did alert the Court to facts showing that the complaint is not time-barred on its face.

The statute of limitations for civil RICO claims is four years. Agency Holding Corp. v. Malley-Duff & Assocs., 107

S.Ct. 2759, 2767 (1987). A RICO cause of action accrues when the plaintiff has actual or constructive notice of the injury which is the basis for his action, unless the statute is tolled. Beneficial Standard Life Insurance Co. v. Madariaga, 851 F.2d 271, 274-75 (9th Cir. 1988). "[T]he plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to the discovery of the fraud." Id. at 275.

The complaint was filed August 12, 1992. The Court found in its order that Phinney's claim was time-barred because although the statute of limitations for civil RICO claims is four years, Phinney first learned of the fraud on August 12, 1987, exactly five years before filing his complaint.

Phinney states in his complaint that he "first learned of the pattern of racketeering activity and the injuries [he] sustained therefrom after August 12, 1987." Complaint at 11:12-14. August 12, 1987 is the date of the Order of the Sixth Circuit Judicial Council ("Council's Order."), which Phinney learned about "thereafter." Complaint at 9:23-25. Phinney does not state exactly when after August 12, 1987 he learned of the pattern of racketeering activity and the injuries he sustained, and does not state when he began an investigation. The complaint states that the FBI "late in 1988 provided Phinney with approximately 40 pieces of new evidence relating to the matters in suit." Complaint at 10:10-11. If Phinney learned of the fraud then, it would be within four years of filing the complaint. Because Phinney's complaint does not in fact state

that he first learned of the fraud on August 12, 1987, the complaint is not time-barred on its face.[1]

Conclusions

For the reasons stated above, the Court HEREBY GRANTS IN PART and DENIES IN PART Plaintiff's motion for reconsideration. The Motion is DENIED, except that the prior Order to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6) is HEREBY AMENDED to show (1) that the complaint is not time-barred on its face and (2) that the dismissal is without prejudice.

IT IS SO ORDERED.

Dated: Aug 5 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

[1] In their opposition to the motion for reconsideration, Defendants requested that the Court impose sanctions on Phinney and his attorney for filing the motion. Because Phinney brought relevant facts to the Court's attention, sanctions are not warranted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3-94-0639
	)	JUDGE ECHOLS
FIRST AMERICAN NATIONAL BANK, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

Presently pending before the Court is Defendants' Motion for Summary Judgment (Docket Entry No. 23), to which Plaintiff has failed to respond. Also pending is Defendants' Motion for Sanctions (Docket Entry No. 19), to which Plaintiff has also failed to respond. In lieu of a response to Defendants' Motions, Plaintiff filed a Motion requesting that the Court grant him an additional extension of time in which to respond to Defendants' Motions. (Docket Entry No. 53) For the reasons discussed in the Memorandum contemporaneously entered herewith, Defendant's Motion for Summary Judgment is GRANTED and Defendant's Motion for Sanctions is GRANTED IN PART and DENIED IN PART. Furthermore,

Plaintiff's Motion for Extension of Time is DENIED. Accordingly, this case is DISMISSED, and Plaintiff is hereby prohibited from filing further lawsuits against Defendants arising from the facts upon which this suit is based without leave of Court.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	No. 3-94-0639
	)	JUDGE ECHOLS
v.	)	
	)	
FIRST AMERICAN NATIONAL BANK, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM

Presently pending before the Court is Defendants' Motion for Summary Judgment, to which Plaintiff has failed to respond. Also pending is Defendants' Motion for Sanctions, to which Plaintiff has also failed to respond. In lieu of a response to Defendants' Motions, Plaintiff filed a Motion requesting that the Court grant him an additional extension of time in which to respond to Defendants' Motions. For the reasons discussed herein, Defendant's Motion for Summary Judgment is GRANTED and Defendant's Motion for sanctions is GRANTED IN PART and DENIED IN PART. Furthermore, Plaintiff's Motion for Extension of Time is DENIED.

Plaintiff filed this suit under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968

("RICO"), seeking to recover damages from Defendants based on allegations that Defendants joined together with the judge presiding over a prior civil suit between Plaintiff and Defendants to form an enterprise with the purpose of depriving Plaintiff of a fair and just trial. Defendants filed a Motion for Summary Judgment contending that Plaintiff's allegations do not have evidentiary support and are not likely to have such support after a reasonable opportunity for further investigation or discovery. Defendants also filed a Motion for Sanctions requesting that the Court require the payment of Defendants' reasonable attorneys' fees incurred as a direct result of this lawsuit, and further, prohibit Plaintiff from filing any further lawsuits against Defendants without leave of the Court to file such suits.

In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. See Anderson v Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. See Martin v. Kelley, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. If so,

summary judgment dismissal is inappropriate.

On January 18, 1968, a jury impaneled in the Criminal Court of Davidson County, Tennessee found Plaintiff guilty of passing a worthless check in the amount of $250.00 and recommended a sentence of eleven months and 29 days in the Davidson County Workhouse. Plaintiff's conviction was subsequently reversed by the Tennessee Criminal Court of Appeals because the statue upon which the indictment was based had been repealed. The decision by the Criminal Court of Appeals was affirmed by the Tennessee Supreme Court and Plaintiff was not reindicted on the charges.

On September 3, 1971, Plaintiff filed a civil action against Defendant in the United States District Court for the Central District of California ("California District Court") for false imprisonment, assault and battery, abuse of process, libel and slander, conspiracy to deprive Plaintiff of civil rights, and malicious prosecution. The California District Court dismissed the complaint for lack of jurisdiction and then, upon Plaintiff's motion to reconsider, vacated its order and transferred the action to the United States District Court for the Middle District of Tennessee ("Middle District of Tennessee"). On May 2, 1973, the Middle District of Tennessee dismissed the action without prejudice for failure to prosecute. On April 22, 1974, Plaintiff refiled his cause of action in the United States District Court for the Western District of Tennessee. On June 28, 1974, after Defendants filed a motion to dismiss for improper venue, the case was transferred to the Middle District of Tennessee.

On October 24, 25, and 26, 1978, a jury trial was held on Plaintiff's claim, which by this time, had been narrowed to claims of malicious prosecution and outrageous conduct. The jury returned a verdict in favor of Plaintiff on both counts and awarded Plaintiff damages of $999.99 in compensatory damages, and $250,000 in punitive damages. On June 1, 1978, Judge Wiseman entered an order granting Defendants' motion for judgment notwithstanding the verdict, which was then affirmed by the Sixth Circuit Court of Appeals on May 18, 1981.

Plaintiff then filed a motion to vacate the judgment notwithstanding the verdict ("J.N.O.V.") in the Middle District of Tennessee contending that Judge Wiseman should have recused himself because of his prior association with Defendants, and that failure to recuse warranted relief from the operation of the judgment against him. The court found that Judge Wiseman's association with Defendants did not warrant mandatory disqualification, and further found that Plaintiff's post-judgment challenge to Judge Wiseman's impartiality "lacks substantial merit and, in some respects, borders on the frivolous." Plaintiff filed a motion to reconsider and, subsequently, an appeal of the decision to the Sixth Circuit, both of which were denied.

Plaintiff then filed a complaint of judicial misconduct with the Judicial Council of the Sixth Circuit ("Council") alleging that Judge Wiseman owned stock in Defendant bank, the judge was indebted to Defendant, and that the judge received cash payments from Defendant while the civil case

was pending. In an order dated August 12, 1987, the Council dismissed the complaint and stated that "[i]t is clear from an examination of the information submitted by the complainant as well as the response of the judge that the allegations are frivolous and that the complaint is subject to dismissal.

On August 12, 1991, Plaintiff filed a complaint in the California District Court claiming Defendants violated RICO by bribing Judge Wiseman to enter the order of J.N.O.V. in the prior civil proceeding, submitting perjurious documents to the Sixth Circuit,[1] and committing mail fraud. The District Court granted Defendants' Motion to Dismiss based on Plaintiff's failure to effect timely service of the summons and complaint.

On August 12, 1992, Plaintiff refiled his complaint in the California District Court. The court granted Defendants' motion and dismissed the case because it did not have personal jurisdiction over the case. Although the court found that it did not have personal jurisdiction over Defendants, it nevertheless concluded that: 1) venue was improperly laid in the Central District of California, 2) Plaintiff's RICO claims are barred by the applicable statute of limitations, 3) Plaintiff failed to allege facts to meet the specificity requirement of

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[1]Plaintiff alleges that Defendants induced Judge Wiseman to lie about the proceedings at which the judge disclosed the extent of his relationship with Defendants. In particular, Plaintiff asserts that Judge Wiseman's representation to the Sixth Circuit that he had disclosed the nature of his

relationship was false. According to the official transcript of the proceedings that occurred during the trial in October, 1978, however, the following exchange occurred between Judge Wiseman and the attorneys for Plaintiff and Defendants:

THE COURT:

Gentlemen, I brought up a matter yesterday in chambers which perhaps we should get on the record, in which I stated to all counsel that as a lawyer prior to my assuming the bench, I at one time represented the defendant First American National Bank in this cause, and at another time prior to 1971, I represented what at that time was an independent bank, First National Bank of Tullahoma, for a brief period of time, which now has subsequently, I think 1973 or '74, become part of the First Amtenn System.

I further advised counsel that I do my personal banking business with First National Bank of Tullahoma, and have for thirty years, and it is now a part of the First American system.

I advised all of you of these facts in order to give you an opportunity to file a motion to recuse myself. I stated to you then and state to you now, none of those matters are of such a nature that the Court feels judgment will be clouded in any manner in the trial of this case. Since no such motion has been filed, I assume that you made your respective clients aware of that and have no objection thereto.

Is that correct, Mr. Aden?

MR. ADEN:

Yes, sir. That is unless Mr. Phinney corrects me, that is correct.

THE COURT:

And Mr. Walker?

MR. WALKER:

That's correct for the defendant.

Federal Rule of Civil Procedure 9(b), 4) Plaintiff failed to allege acts sufficient to constitute racketeering activity, 5) Plaintiff failed to sufficiently allege a RICO enterprise distinct from Defendants.

On August 3, 1994, Plaintiff filed this action in this Court alleging that he is entitled to relief, under RICO because Defendants formed an enterprise with Judge Wiseman. Plaintiff alleges that 1) Defendants conspired and agreed to bribe Judge Wiseman through cash payments, stock payments, forgiveness of debt in exchange for the judgment not withstanding the verdict entered in the prior civil trial, 2) Defendants submitted papers to the United States Court of Appeals for the Sixth Circuit which were fabricated, 3) Defendants coerced the judge into lying to the Judicial Council of the Sixth Circuit, and 4) Defendants committed mail fraud by mailing falsified legal papers to the Sixth Circuit.

As an initial matter, Local Rule 8(b)(3) provides that "[f]ailure to file a response shall indicate that there is no opposition to the motion." Defendant filed this Motion for Summary Judgment on August 31, 1995. Plaintiff has failed to respond to Defendant's Motion. The Court finds that Plaintiff's failure to respond alone warrants granting of Defendants' Motion for Summary Judgment and dismissal of this action.

Even assuming Plaintiff filed a response, this case should be dismissed because Plaintiff's claims are barred under the statute of limitations. The statute of limitations for civil

claims filed under RICO is four years. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 156 (1987). Under federal law, the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury upon which the action is based. McCune v. City of Grand Rapids, 842 F.2d 903, 905 (6th Cir. 1988). The factual basis for Plaintiff's claim arose when Defendants allegedly formed an enterprise with Judge Wiseman during the 1978 civil trial between Plaintiff and Defendants. Plaintiff further alleges certain improprieties with respect to his subsequent appeal to the Court of Appeals for the Sixth Circuit in which that Court dismissed Plaintiff's claim in 1981. Considering the protracted litigation that has resulted from the events that occurred in 1978 and in 1981, the Court is of the opinion that Plaintiff had constructive knowledge of the facts which gave rise to his claims many years before filing this suit. Furthermore, even if the Court assumes the Plaintiff did not know of Defendants' alleged improprieties at the time of their occurrence, it is clear that he was well aware of these facts when he filed a complaint with the Judicial Council sometime prior to August, 1987.[2] Furthermore, even though one of Plaintiff's claims arises out of the 1987 Judicial Council proceedings, namely

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[2] As the Judicial Council rendered its order on August 12, 1987, Plaintiff presumably filed his complaint prior to that date.

Plaintiff's allegation that Defendants coerced Judge Wiseman into lying to the Judicial Council in order to conceal prior improprieties, it is clear from the Complaint that Plaintiff was aware of this claim, at the latest, by May 12, 1989.[3] Thus, construing the facts in the light most favorable to Plaintiff, the latest date that the RICO limitations period could have begun to run is in 1989. As Plaintiff filed this Complaint on August 3, 1994, over four years later, Plaintiff's claims are clearly barred by the applicable statute of limitations. Accordingly, Defendants' Motion for Summary Judgment is GRANTED.

Defendants have also requested that the Court impose sanctions on Plaintiff under Rule 11. The determination of an appropriate sanction is within the discretion of the Court. Mann v. G & G Mfg., Inc., 900 F.2d 953, 958 (6th Cir. 1990), cert. denied, Sloan v. G & G Mfg. Inc., 498 U.S. 959 (1990). The principal goal of Rule 11 is deterrence of certain conduct, and therefore, the Court should impose the least severe sanction that is likely to deter the conduct at issue. Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989). The severity of the sanction, however, may vary according to the severity of the misconduct. Mihalik v. Pro Arts, Inc., 851 F.2d 790, 792-93 (6th Cir. 1988). Costs and attorneys' fees are often imposed as sanctions for Rule 11 violations, and sometimes double costs and double attorneys' fees are warranted when the misconduct at issue is mendacious. See Combs v. Rockwell Intern. Corp., 927 F.2d 486, 489 (9th Cir. 1991), cert. denied, 502 U.S. 859 (1991) (assessing double costs and attorneys' fees as sanctions

for filing a frivolous appeal); Thomas v. United States, 671 F. Supp. 15, (E.D. Wis. 1987) (assessing attorneys' fees and costs for one defendant and double costs for other defendant as a Rule 11 sanction for filing a frivolous claim).

Many courts have granted sanctions against plaintiffs for pursuing different claims regarding the same legal issues or claims contrary to well-established law and not supported by a colorable argument for a change in the law. See Cook v. Spillman, 806 F.2d 948 (9th Cir. 1986) (sanctioning pro se plaintiff challenging tax laws); Coleman v. C.I.R., 791 F.2d 68 (7th Cir. 1986). The only purpose of these suits is to "clog the court's dockets, waste judicial time and cause protracted delay in worthy litigation." Cook, 806 F.2d at 948.

In the present case, Defendants allege that Plaintiff has repeatedly filed frivolous lawsuits with the intent to harass and has requested that the Court impose sanctions pursuant to Rule 11. On June 1, 1978, Judge Wiseman entered an order granting Defendants' motion for J.N.O.V. effectively nullifying the $250,999.00 jury award. Such a turn of events would understandably upset even the staunchest of litigants. However, almost twenty years and several lawsuits later, the issues that arose as a result of Judge Wiseman's order granting

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[3] In his Complaint, Plaintiff alleges that, on May 12, 1989, he received information from the Federal Bureau of Investigation which allegedly demonstrate that Judge Wiseman lied to the Judicial Council. See Complaint, ¶18.

J.N.O.V. continue to be litigated. Although Plaintiff has characterized his numerous claims in a variety of manners, the gravamen of his complaint has remained unchanged: the J.N.O.V. entered in 1978 was fraudulently and illegally obtained as a result of Defendants' allegedly nefarious relationship with Judge Wiseman.[4] This claim has been raised in some form in numerous proceedings and, without exception, has been dismissed.[5]

The Court recognizes that Plaintiff is a pro se litigant and, as such, may be less adept in determining whether a particular claim is frivolous. However, not only has Plaintiff gained experience through his involvement with this litigation which arose out of the same facts for almost two decades, the most recent ruling by the California District Court with respect to Plaintiff's claims clearly placed him on notice that his claims are frivolous. After concluding that it lacked personal jurisdiction over Defendants, the California District Court, in a well-reasoned opinion, stated that Plaintiff's RICO claim

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[4] The Court notes that, the precise portrayal of this relationship has changed from a mere conflict of interest which warranted recusal to allegations that Defendants bribed Judge Wiseman to the most recent allegations, that the relationship constitutes an criminal enterprise under RICO. Plaintiff has even added allegations that Defendants and Judge Wiseman have attempted to conceal these alleged wrongdoings. The Court, however, is of the opinion that the basic allegation upon which Plaintiff seeks relief remains the same.

[5] Plaintiff has raised the issue of the propriety of the relationship between Defendants and Judge Wiseman as follows:

1. Middle District of Tennessee: motion to vacate the J.N.O.V. based on allegations that Judge Wiseman should have recused himself because of his prior association with Defendants;

2. Middle District of Tennessee: motion to reconsider the denial of his motion to vacate;

3. Court of Appeals for the Sixth Circuit: appeal of the decision of his motion to vacate;

4. Judicial Council of the Sixth Circuit: a complaint of judicial misconduct against Judge Wiseman pertaining to his relationship with Defendants which was dismissed as frivolous.

5. California District Court: complaint that Defendants violated RICO by bribing Judge Wiseman to enter the Order of J.N.O.V. in the prior civil proceeding, submitting perjurious documents to the Sixth Circuit, and committing mail fraud dismissed based on Plaintiff's failure to effect timely service of the summons and complaint;

6. California District Court: identical complaint that Defendants violated RICO which was dismissed for lack of personal jurisdiction and for other reasons including the court's conclusion that Plaintiff's RICO claims are barred by the applicable statute of limitations.

7. Middle District of Tennessee: the current complaint alleging RICO violations.

was clearly barred by the statute of limitations. Nevertheless, Plaintiff chose to refile a virtually identical complaint with this Court almost two years after the dismissal of the California claim. Furthermore, the California District Court found that Plaintiff failed to plead with sufficient specificity, failed to allege facts sufficient to support a pattern of racketeering under RICO, and failed to allege facts to support a RICO enterprise.[6] It is clear that, following the California District Court's ruling, Plaintiff should be well aware that his claim lacks merit, and, as such, that any further lawsuits based on the same facts would be considered frivolous.

After thoroughly reviewing the record and submissions of the parties, any future suits filed by Plaintiff involving similar claims will be regarded as frivolous and thus sanctionable. Accordingly, in the interests of protecting the courts from needless litigation, and in the interests of protecting Defendants from the expenses of defending against frivolous lawsuits, Plaintiff is hereby prohibited from filing any lawsuits against Defendants that are based on these facts without leave of this Court. Finally, although the Court is of the opinion that monetary sanctions are not necessary to deter Plaintiff's conduct at this time, see Jackson, 875 F.2d at 1229 (holding that the court should impose the least severe sanction that is likely to deter the conduct at issue), the Court cautions Plaintiff, that, should he choose to file another lawsuit based upon these facts, the Court will not hesitate in imposing monetary sanctions.

For the foregoing reasons, Defendant's Motion for

Summary Judgment is hereby GRANTED and Defendant's Motion for Sanctions is GRANTED IN PART and DENIED IN PART. Accordingly, this case is DISMISSED, and Plaintiff is hereby prohibited from filing further lawsuits against Defendants arising from the facts upon which this suit is based without leave of Court.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

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[6] **The Court notes that, although the California District Court's discussion of the merits of Plaintiff's claims clearly notified him that his claims lacked merit, the conclusions of that court do not have res judicata effect on this Court because the case was dismissed for lack of personal jurisdiction. Cf. Ohio State Pharmaceutical Assoc. v. Creasy, 587 F. Supp. 698, 704 (S.D. Ohio 1984) (holding no res judicata effect where the prior court did not decide the case on its merits).**

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE JOHN G. DAVIES, JUDGE PRESIDING

- - -

DON RAY PHINNEY,	)	
	)	
Plaintiff(s)	)	No. CV-92-4823 JGD(Ex)
	)	
v.	)	
	)	
FIRST AMERICAN	)	
NATIONAL BANK, et al.,	)	
	)	
Defendant(s)	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, August 2, 1993

BEVERLY A. CASARES CSR #8630
Official Court Reporter
312 North Spring Street
Room 440
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APPEARANCES:

FOR PLAINTIFF(S) ROBERT RENTZER:
5445 Balboa Dr.
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FOR DEFENDANT(S) THOMAS KASTER

LOS ANGELES, CALIFORNIA; MONDAY, AUGUST 2, 1993

THE CLERK: Next item on calendar, number 7, case Don Ray Phinney versus First American National Bank.

MR. AUSTRA: Good afternoon, Peter Austra for First American National Bank and the Corporation.

MR. KASTER: Good afternoon, Thomas Kaster and Richard Morse from the Beli Office on behalf of Plaintiff.

Good afternoon co-counsel Robert Rentzer and Mr. Rentzer however I will not be addressing the Court. We're not trying to gang up on counsel. Robert Keenan is with me also.

THE COURT: All right. Have read the tentative.

MR. RENTZER: Yes, your Honor.

THE COURT: I have ordered that some allegations to my prior order, the motion for reconsideration is partially successful. Any argument from either side?

MR. KASTER: Your Honor, I'd like -- the statue of limitations -- and the Court, as I understood the basis for the Court's prior ruling, it was that whatever it was that the plaintiff derived from the 1987 Sixth Circuit order was something that the plaintiff -- is constructive knowledge as of August 1987 and, therefore, the August 1992 filing was not timely. And the only thing that the plaintiff said in opposition to that was that that was a question for the jury. The issue of constructive knowledge, which is not correct, that's a question of law, and it's for the Court, and I think the Court properly--

THE COURT: If the facts are clear it is a matter of law absolutely. There was a complaint filed, written, and filed

by a gentleman who's not a lawyer, and upon reconsideration the allegations in the complaint, I felt I was wrong initially in closing that door.

MR. KASTER: It's a matter of proof, I saw that.

Your Honor, I think that in the tentative ruling the Court cites two things: One, the reference -- and I'm referring to page 4 of the tentative ruling -- the Court refers to allegations relating to the knowledge of that 1987 ruling. And now looking at page 4 of the Court's tentative ruling at lines 18 and 19, the Court states quote: He began an investigation as early as -- and then quote, which I believe the Court is quoting from the Complaint, late in 1988." Closed quote. And then the Court cites the Complaint at page 10, paragraph 10 with all due respect, your Honor, there's been some miscitation there, because there is no such allegation in the Complaint. And I could understand that that would be if the Court felt that that was something that the -- that had been alleged that that might cause confusion here, but I don't find that in the -- in the Complaint, and I looked for it. And I did it in the courtroom, but that particular --

THE COURT: All right. I will take note of that, counsel, and I will double-check it.

MR. KASTER: Then dealing with the -- is that a correct citation to the complaint?

MR. RENTZER: Your Honor, I believe the Court cites page 10. I'm sorry the Court cited --

THE COURT: That means page 10, line 10. Is that a mistake?

MR. KASTER: What it says, your Honor, it starts with line 11. Plaintiff sought out the help of the FBI, said agency provided Phinney with approximately 40 pieces of new evidence relating to the matters ensued. Line 14 may have been 1989, the Department of Justice provided Phinney with approximately 34 pieces of new evidence.

MR. RENTZER: Those are accurate statements in the Complaint. But those do not state that the plaintiff began a -- an investigation in 1988. And in fact after the plaintiff, in their Complaint, talks about the -- what he learned in 1987. That's immediately followed by the allegations in paragraph 30, which proceeds what counsel just read saying that the aforementioned acts constituted violations of 18 U.S.C., sections 224 and 15023 concerning bribery and obstruction of justice. And that is what appears at page 10, line 10 or concludes at page 10, line 10.

THE COURT: All right.

MR. KASTER: Just moving to the other subject I want to touch on briefly.

The Court has now said that it is considering granting the motion to dismiss without prejudice. And as I understand it, the Court has already found that this Court has no jurisdiction that venue is improper here. And that there's been no cause of action stated, apart for several reasons. And I think that the order should make clear granted without prejudice does not mean that the plaintiff can file again in this court file these allegations in this court, because I think there will be confusion about what the meaning of not without

prejudice is, but this case is dismissed if I understand the plaintiff's remedy is to go to the court where there is jurisdiction and proper venue, not this court.

THE COURT: The intent of this motion, this ruling is simply to revive the case sufficiently to allow the plaintiff to get to the right court and file a complaint in the right court.

MR. KASTER: If there is one.

THE COURT: It's under submission.

MR. KASTER: Thank you, your Honor.

THE COURT: Thank you.

MR. RENTZER: Just briefly, your Honor. We submit to the Court's ruling on the statute of limitations. We would ask for the ruling that the statute of limitations is tolled by the filing of the August 1992 complaint so that when plaintiff refiles in the proper jurisdiction there is not a renewed motion to dismiss.

THE COURT: Oh, I don't have to rule on that. That would be the case, would it not anyway, as a matter of law?

MR. RENTZER: Okay, your Honor. I just had a couple of points about jurisdiction. I believe we disagree with the Court's tentative on jurisdiction and the venue. The plaintiff has made a prime facie showing of personal jurisdiction.

THE COURT: I found to the contrary, counsel. I can't see that the First American -- First American National Bank, First American Corporation is doing business in California. The contacts are very, very, very tenuous.

MR. RENTZER: Your Honor, I believe under case

law the plaintiff at this stage of the proceedings which is before an answer is even filed, he should be allowed to do some discovery.

THE COURT: He's provided ample evidence to support the jurisdiction and the venue.

MR. RENTZER: Okay. Another point briefly on the statute of limitations, your Honor. Even assuming arguendo that plaintiff had some knowledge, that is not the same as having sufficient knowledge to learn about a RICO-type injury. And I would just like to say briefly, your Honor, regarding the defendant's request for sanctions, all they -- your Honor denied that request of $5700 in sanctions. I'd like to point out that plaintiff feels that was a frivolous request for sanctions, and under the Ninth Circuit case of Parding (ph.) 1989 case, the Ninth Circuit held that frivolously requesting sanctions is -- it is subject to sanctions. And I'd like to quote the language of the chief judge.

THE COURT: Is this a part of your opposition? Did you request sanctions --

MR. RENTZER: No, your Honor.

THE COURT: -- The frivolous question of sanctions?

MR. RENTZER: No, your Honor.

THE COURT: So, you're -- that's about what you're to do is request sanctions for the frivolous request of sanctions.

MR. RENTZER: Your Honor, I just want to point out that it is frivolous.

THE COURT: But that isn't a remedy you sought in your writings?

MR. RENTZER: No, your Honor.

THE COURT: So, this is my first notice of it. So, wouldn't you say that your request for sanctions, because of the frivolous request of sanctions is, in fact, frivolous?

MR. RENTZER: Your Honor, I would just point out that the request made by the defendants after your Honor clearly pointed out in the December 14, 1992 hearing, invited plaintiff to move to reconsider. The Court, incumbent upon any new counsel reading a copy of the transcript of that hearing, they would have seen that your Honor did invite the plaintiff to obtain counsel as expeditiously as possible, and asked the Court to reconsider its order. And upon that basis I believe the request was frivolous, your Honor.

Thank you.

THE COURT: All right. I thank you. It's under submission.

MR. KASTER: Thank you, your Honor.

(Proceedings concluded.)

CERTIFICATE

I hereby certify that the foregoing matter entitled DON RAY PHINNEY versus FIRST AMERICAN NATIONAL BANK, ET AL No. CR-92-686-JGD is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

/s/ Beverly A. Casares 9/18/96

BEVERLY A. CASARES CSR#8630 DATED:

Official Court Reporter

APPENDIX D

No. 97-5870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY,	)	
	)	
Plaintiff-Appellant,	)	ORDER
	)	
v.	)	
	)	
FIRST AMERICAN NATIONAL BANK; FIRST AMERICAN CORPORATION (TENN.); DOES 1-100, INCLUSIVE,	)	
	)	
Defendants-Appellees.	)	

(Not recommended for full-text publication)

Before: KEITH, BOGGS, and NORRIS, Circuit Judges.

This matter is before the court upon consideration of the Don Ray Phinney's response to this court's order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal. Phinney responded stating that he has a 60 day appeal period because United States District Court Judge Wiseman was intended to be one of the John Does in the case as evidenced by the RICO Statement.

It appears from the documents before the court that the appellant filed a complaint on August 3, 1994 in the district

court naming the parties listed in the caption of this order. Service of the complaint was made upon First American National Bank and First American Corporation. Judge Wiseman was not named as a party in the caption of the complaint as required by Fed. R. Civ. P. 10(a). Although the RICO Statement filed on April 28, 1995 mentions actions of Judge Wiseman in a previous district case, no amended complaint was filed adding Judge Wiseman as a party. Judge Wiseman was not named
as a defendant in the action and Phinney is not entitled to a 60 day appeal period. *See* Fed. R. App. P. 4(a)(1).

Phinney appealed on July 3, 1997 from the order entered on May 8, 1997 denying an extension of time and vacating a ruling on a late motion to reconsider. The notice of appeal was filed 24 days late. *See* Fed. R. App. P. 4(a) and 26(a).

The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam). Fed R. App. P. 26(b) specifically provides that this court cannot enlarge the time for filing a notice of appeal.

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

(2)

Supreme Court, U.S.
FILED
FEB 23 1998
CLERK

No. 97-1222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DON RAY PHINNEY,
PETITIONER,

v.

FIRST AMERICAN NATIONAL BANK AND
FIRST AMERICAN CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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February 25, 1998

CASILLAS PRESS • 1717 K STREET, N.W. • WASHINGTON, D.C. 20006 • (202) 223-1220

28 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in dismissing petitioner Don Ray Phinney's appeal due to lack of jurisdiction because Phinney filed his notice of appeal from the district court's final order 24 days late.

RULE 29.6 STATEMENT

The parent company of respondent First American National Bank is First American Corporation.

Respondent First American Corporation has no parent company.

Respondent First American Corporation has no subsidiaries except those it wholly-owns.

Respondent First American National Bank has the following non-wholly-owned subsidiaries:
The SSI Group, Inc.
IFC Holdings, Inc.

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(Matthew Bender 3d ed., rel. 113-3/97) 4

OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit, concerning which Phinney now seeks a writ of *certiorari*, is unreported. In this order, the Sixth Circuit rejected Phinney's attempt to show why his notice of appeal should be held to be timely, and dismissed Phinney's appeal for lack of jurisdiction. The Sixth Circuit issued the order October 29, 1997, in appeal no. 97-5870. (Pet. App. D; Resp. App. p. 1).

The order of the Court of Appeals for the Sixth Circuit, permitting Phinney to show cause why his appeal should not be dismissed as untimely, is unreported. The Sixth Circuit issued the order August 8, 1997, in appeal no. 97-5870. (Resp. App. p. 3).

The Memorandum and Order of the District Court for the Middle District of Tennessee from which Phinney untimely sought to appeal is unreported. By this Order, the District Court denied Phinney's request for enlargement of time within which to move for reconsideration of an order granting summary judgment to respondents. The district court issued the Memorandum and Order May 8, 1997, in case no. 3-94-0639. (Resp. App. p. 4).

The order of the Court of Appeals for the Sixth Circuit, directing the district court to determine whether an undocketed letter from Phinney to that court, dated April 10, 1997, should be treated as a motion to reconsider or as a request for enlargement of time within which to move for reconsideration, is unreported. The Sixth Circuit issued the order March 28, 1997, in appeal no. 96-6222. (Resp. App. p. 12).

FEDERAL RULES INVOLVED IN THE CASE

Federal Rule of Appellate Procedure 4(a) states in pertinent part:

(a) Appeal in a Civil Case. –

(1) Except as provided in paragraph (a) (4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.

Federal Rule of Appellate Procedure 26(b) states in pertinent part:

(b) Enlargement of Time. –

The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

STATEMENT OF THE CASE

After bringing an exhaustive series of lawsuits against respondents First American National Bank and First American Corporation ("First American") over three decades, none of which have been successful, Phinney filed the action which has led to the present petition for *certiorari* on August 3, 1994.

Phinney's animus towards First American stems from his 1968 conviction in Tennessee state court for passing several bad checks to First American National Bank in 1966. His conviction was later reversed on appeal because the statute upon which the indictment was based had been repealed. *State v. Phinney,* Supreme Court of Tennessee, unreported decision dated Sept. 8, 1970.

Phinney filed several actions for malicious prosecution against First American in California and in Tennessee, eventually resulting in a trial in 1978 in the Middle District of Tennessee, presided over by Judge Thomas Wiseman. Prior to trial, Judge Wiseman informed counsel for both parties of certain prior contacts and relationships with First American, and asked if either party objected to his sitting as judge in the case. Neither party objected. On June 1, 1979, Judge Wiseman granted judgement for First American notwithstanding a verdict in favor of Phinney, and the Sixth Circuit affirmed. *Phinney v. First American National Bank,* Sixth Circuit Appeal No. 79-1372, unreported order dated March 18, 1981, Table at 652 F.2d 58 (6th Cir. 1981).

Phinney then sought to vacate Judge Wiseman's judgment, asserting for the first time that Judge Wiseman should have recused himself from the trial *sua sponte.* Judge C.G. Neese denied the motion and the Sixth Circuit affirmed. *Phinney v. First American National Bank,* Sixth Circuit Appeal No. 83-5098, unreported order dated March 12, 1984, Table at 732 F.2d 155 (6th Cir. 1984). Phinney filed a petition for *certiorari*, which this Court denied on October 1, 1984; this Court also denied his petition for reconsideration. *Phinney v. First American National Bank,* 469 U.S. 829, *reh. denied,* 469 U.S. 1067 (1984).

Phinney then complained to the Sixth Circuit, accusing Judge Wiseman of accepting bribes from respondents while the 1978 case was pending. Chief Judge Lively of the Sixth Circuit found Phinney's complaint frivolous and dismissed it. *In re Complaint of Judicial Misconduct,* No. 87-6-372-07 (Aug. 12, 1987). Phinney did not petition the Judicial Council of the Sixth Circuit for review of this dismissal, and Chief Judge Lively's order became final and unreviewable.

Phinney then began a series of lawsuits in federal courts in California, accusing First American of RICO violations for allegedly bribing Judge Wiseman. All these actions were dismissed on numerous separate and independent grounds; however, in one of these actions, Judge J.G. Davies of the Central District of California noted that he could not determine from the face of the complaint alone whether Phinney's action was time-barred. *Phinney v. First American National Bank,* United States District Court for the Central District of California, Case No. CV 92-4823, unreported order dated August 6, 1993. Pet. App. p. 1.

Phinney then filed another RICO action against First American in the Middle District of Tennessee. This case was assigned to Judge Robert L. Echols, who granted First American's Motion for Summary Judgment. *Phinney v. First American National Bank,* United States District Court for the Middle District of Tennessee, Case No. 3:94-0639, unreported order dated March 29, 1996. Pet. App. p. 6. Among the bases for his ruling, Judge Echols found that Phinney's action was time-barred. Judge Echols also granted First American's motion for Rule 11 sanctions based on Phinney's frivolous and vexatious litigations against First American, and prohibited Phinney from filing any further lawsuits against First American arising from the facts alleged to give rise to the asserted bribery and RICO violations. The clerk docketed the order on April 2, 1996, dismissing the complaint.

On April 12, 1996, Judge Echols received a letter from Phinney dated April 10, 1996. On April 22, 1996, Phinney filed a motion for reconsideration, which Judge Echols denied on July 30,

1996. Phinney appealed this order on August 22, 1996 (Sixth Circuit appeal no. 96-6222). On February 3, 1997, the Sixth Circuit noted that Phinney's notice of appeal of the April 2, 1996 dismissal appeared to be untimely, and provided Phinney an opportunity to show cause why his appeal should not be dismissed for lack of jurisdiction. Phinney responded that his April 10 letter was a request for enlargement of time, or a motion for reconsideration.

On March 28, 1997, the Sixth Circuit instructed Judge Echols to determine whether the April 10 letter was a motion for reconsideration of the March 29, 1996 order, or was a request for an enlargement of time within which to file a motion for reconsideration. Resp. App. p. 12.

On May 8, 1997, Judge Echols issued a Memorandum and Order finding that the letter was a request for enlargement of time, and denying the request. Resp. App. p. 4. On September 24, 1997, the Sixth Circuit dismissed appeal no. 96-6222. Phinney did not seek *certiorari* from this dismissal

On July 3, 1997, Phinney filed a notice of appeal of Judge Echols' May 8 Memorandum and Order (Sixth Circuit appeal no. 97-5870). On August 8, the Sixth Circuit, noting that Phinney's notice of *this* appeal also appeared to be untimely, permitted Phinney an opportunity to show cause why his appeal of the May 8 Memorandum and Order should not be dismissed for lack of jurisdiction. Resp. App. p. 3. Phinney responded and argued that Judge Wiseman was a party to the underlying RICO suit, and thus Phinney was permitted 60 days within which to file his notice of appeal.

On October 29, 1997, The Sixth Circuit found that Judge Wiseman was not a party to Phinney's action, ruled that Phinney was not entitled to 60 days within which to file a notice of appeal, and dismissed appeal no. 97-5870 for lack of jurisdiction. Pet. App. p. 30; Resp. App. p. 1. Phinney then filed the instant petition for *certiorari* in this Court.

REASONS FOR DENYING THE WRIT

This Court should deny Don Ray Phinney's petition. It is filled with unsubstantiated and meritless allegations of criminal conduct by several federal district judges and court personnel; Phinney seeks to litigate the merits of actions that have not been considered by the Sixth Circuit Court of Appeals; and he seeks to challenge this Court's denial more than ten years ago of his 1983 petition for *certiorari*. Moreover, Phinney's petition presents no compelling reason for *certiorari* as set forth in Supreme Court Rule 10. Finally, the decision of the court of appeals, dismissing his appeal for lack of jurisdiction, is clearly correct.

I. THE PETITION SEEKS REVIEW OF MATTERS AS TO WHICH THE PETITION IS UNTIMELY, AND DOES NOT SEEK REVIEW OF THE ONLY MATTER AS TO WHICH THE PETITION IS TIMELY

Phinney has asked this Court to issue a writ of *certiorari* to the Sixth Circuit Court of Appeals to review its October 29, 1997, Order finding that it lacked jurisdiction over Phinney's appeal from Judge Echol's decision denying Phinney's April 10 letter request for an enlargement of time within which to move for reconsideration of Judge Echol's decision to grant First American's motion for summary judgment. *See* Pet. App. p. 30; Resp. App. p. 1. This Court has jurisdiction to determine whether the Sixth Circuit lacked jurisdiction over Phinney's appeal, *see Nixon v. Fitzgerald,* 457 U.S. 731, 741-743 (1982), but this Court's jurisdiction is limited to the narrow question of the Sixth Circuit's jurisdiction.

In a case seeking review of a federal circuit court decision, this Court may only obtain jurisdiction on writ of *certiorari* over cases that are "in" the circuit court. *See* 22 *Moore's Federal Practice* § 405.03[1] (Matthew Bender 3d ed., rel. 113-3/97); *United States v. Nixon,* 418 U.S. 683, 690-692 (1974). But the effect of the Sixth Circuit's March 29, 1997, Order was to keep Phinney's case *out* of the Sixth Circuit. Necessarily, therefore, the

matters for which he may seek review are limited to the jurisdictional matters decided by the Sixth Circuit in its March 29, 1997 Order, in which the court dismissed Phinney's appeal because he filed his notice of appeal outside the time permitted by Fed. R. App. P. 4(a).

But Phinney never challenges the correctness of that order in his petition. Phinney does not challenge the correctness of *any* decision of the Sixth Circuit. Instead, he asserts that he "was found innocent" of the 1968 bad check criminal charges, when in fact he was convicted and the conviction was later vacated for procedural error; he charges First American with bribing a music promoter to destroy his supposed country-music singing career; and he seeks review of the propriety of Judge Wiseman's presiding over the 1978 malicious prosecution lawsuit. *See* Petitioner's First Question Presented. But this was the subject matter of Phinney's petition to this Court in 1983, which this Court denied in *Phinney v. First American National Bank*, 469 U.S. 829, *reh. denied*, 469 U.S. 1067 (1984). The fact that this Court ruled on Phinney's 1983 petition, and therefore must have reviewed that petition, also belies Phinney's unsubstantiated charges that First American and/or Judge Wiseman bribed an employee in the Supreme Court clerk's office in 1983 to prevent his 1983 petition for *certiorari* from reaching the chambers of the justices.

Phinney's petition also charges that Judge Wiseman bribed an official of the Judicial Council of the Sixth Circuit to engage in a cover-up and in violations of procedural rules to cause the Judicial Council to reject Phinney's charges that Judge Wiseman had taken bribes from First American. *See* Petitioner's Second Question Presented. To the extent that Phinney revived these issues in the 1994 lawsuit that led to the present petition (which First American does not concede), these matters are not properly before this Court, because these matters have never been before the Sixth Circuit.

Finally, Phinney asks this Court to resolve an alleged difference of opinion between two federal district courts,

concerning whether the statute of limitations barred his complaint. But this matter, too, has never been the subject of a decision by the Sixth Circuit and thus is not properly before this Court.

II. THE ISSUES PRESENTED DO NOT MERIT REVIEW: THERE IS NO CONFLICT AMONG THE CIRCUITS AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Phinney asserts that "the main reason" for granting his petition is to decide which of two district courts is correct concerning the question of whether his RICO suit was timely filed. Petition at 8. He also asks this Court to undertake an internal investigation of alleged misconduct by staff of this Court and of the Sixth Circuit. But these issues are not before the Court. *Supra* at Section I. Even if they were, they do not merit review and do not satisfy the requirements of Rule 10 of this Court: there is no conflict between any of the circuits, nor is there a substantial federal question presented.

III. THE CIRCUIT COURT'S DECISION ON THE MERITS WAS CORRECT

In its October 29, 1997, order, the Sixth Circuit ruled that Phinney was not entitled to a 60-day period within which to file a notice of appeal because no federal official was a party to the action from which Phinney sought to appeal. Phinney argued that Judge Wiseman was a party to the 1994 lawsuit, but the Court of Appeals rejected this assertion, correctly noting that Judge Wiseman was never named as a party. Phinney does not challenge this ruling in the petition. Thus, as the Court of Appeals ruled, Phinney was required to file his notice of appeal within 30 days of the May 8, 1997 ruling by Judge Echols. Fed. R. App. P. 4(a) and 26(a) & (b); *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989). He failed to file within that time. Accordingly, the Sixth Circuit correctly ruled that Phinney's failure to file a timely notice of

appeal prevented the Sixth Circuit from obtaining jurisdiction to review Judge Echols' May 8, 1997, ruling.

CONCLUSION

For the reasons stated, Don Ray Phinney's petition should be denied.

Respectfully Submitted,

EDWARD H. SISSON
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February 25, 1998

No. 97-5870
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY,	)	FILED
	)	Oct. 29, 1997
Plaintiff-Appellant,	)	Leonard Green
	)	Clerk
v.	)	
	)	ORDER
FIRST AMERICAN NATIONAL BANK;	)	
FIRST AMERICAN CORPORATION	)	
(TENN);	)	Not Recommended
DOES 1-100, INCLUSIVE,	)	for Full-Text
	)	Publication
Defendants-Appellees.	)	

Before: KEITH, BOGGS, and NORRIS, Circuit Judges.

This matter is before the court upon consideration of the Don Ray Phinney's response to this court's order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal. Phinney responded stating that he has a 60 day appeal period because United States District Court Judge Wiseman was intended to be one of the John Does in the case as evidenced by the RICO Statement.

It appears from the documents before the court that the appellant filed a complaint on August 3, 1994 in the district court naming the parties listed in the caption of this order. Service of the complaint was made upon First American National Bank and First American Corporation. Judge Wiseman was not named as a party in the caption of the complaint as required by Fed. R. Civ. P. 10(a). Although the RICO Statement filed on April 28, 1995 mentions actions of Judge Wiseman in a previous district court case, no amended complaint was filed adding Judge Wiseman as a party.

Judge Wiseman was not named as a defendant in the action and Phinney is not entitled to a 60 day appeal period. *See* Fed. R. App. P. 4(a)(1).

Phinney appealed on July 3, 1997 from the order entered on May 8, 1997 denying an extension of time and vacating a ruling on a late motion to reconsider. The notice of appeal was filed 24 days late. *See* Fed. R. App. P. 4(a) and 26(a).

The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam). Fed. R. App. P. 26(b) specifically provides that this court cannot enlarge the time for filing a notice of appeal.

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

No. 97-5870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY, Plaintiff-Appellant, *v.* FIRST AMERICAN NATIONAL BANK; FIRST AMERICAN CORPORATION (TENN); DOES 1-100, INCLUSIVE, Defendants-Appellees.	)	FILED August 8, 1997 Leonard Green Clerk ORDER

Appellant is appealing from the order denying reconsideration and an extension of time.

It appears from the documents before the court that the order appealed was entered May 8, 1997. The notice of appeal filed on July 3, 1997 was late. *See* Fed. R. App. P. 4(a) and 26(a).

It further appears from the record that appellant did not apply to the district court for an extension of time within which to file the notice of appeal late, due to excusable neglect, and it appears that no such extension of time has been granted by the district court.

It is therefore ordered that appellant show cause in writing not later than twenty-one days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction.

It is further ordered that the briefing schedule be held in abeyance pending the resolution of the question of jurisdiction.

ENTERED PURSUANT TO RULE 8(b),
RULES OF THE SIXTH CIRCUIT
/s/ Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3-94-0639
	)	JUDGE ECHOLS
FIRST AMERICAN NATIONAL BANK, *et al.*,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM

Plaintiff filed this suit under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 ("RICO"), seeking to recover damages from Defendants based on allegations that Defendants joined together with the judge presiding over a prior civil suit between Plaintiff and Defendants to form an enterprise with the purpose of depriving Plaintiff of a fair and just trial. On August 31, 1995, Defendants filed a Motion for Summary Judgment (Docket Entry No. 23) and a Motion for Sanctions (Docket Entry No. 19). Five months later, Plaintiff filed a Motion requesting additional time within which to file a response to Defendants' pending Motions (Docket Entry No. 47). On February 23, 1996, the Court granted the motion and gave Plaintiff until March 20, 1996, to respond to Defendants' Motion (Docket Entry No. 51). On March 28, 1996, Plaintiff [filed – sic] another Motion (Docket Entry No. 53) again requesting additional time to respond to Defendants' Motion for Summary Judgment and Motion for Sanctions. On March 29, 1996, this Court entered an Order (Docket Entry No. 55) denying Plaintiff's request. In that Order, the Court also granted Defendants' Motion

for Summary Judgment and granted the Motion for Sanctions to the extent that Plaintiff was prohibited from filing further lawsuits against Defendants arising from the facts upon which this suit is based without leave of Court. On April 12, 1996, the Court received a letter from Plaintiff dated April 10, 1996, which was not docketed, regarding the Court's ruling on Defendants' Motion for Summary Judgment and Motion for Sanctions. On April 22, 1996, Plaintiff filed a Motion to Reconsider (Docket Entry No. 57) which the Court denied in an Order (Docket Entry No. 64) entered on July 30, 1996. Plaintiff filed a Notice of Appeal (Docket Entry No. 65) on August 22, 1996.

On March 31, 1997, this Court received an Order (Docket Entry No. 66) entered by the United States Court of Appeals of the Sixth Circuit. In that Order, the Sixth Circuit remanded this case for a determination of whether the letter received by this Court on April 12, 1996, was sufficient to be treated as a motion to reconsider or whether it should have been treated as a motion for an extension of time. The Order also directed that, should the Court determine that the letter was sufficient to be a motion to reconsider or a motion for extension of time, such letter should be entered on the Court's docket sheet and a ruling made on the matter.

The Court has reviewed the letter submitted by Plaintiff and finds that this letter should be treated as a motion for extension of time to file a motion to reconsider. Plaintiff informed the Court that his father had passed away. He then stated that:

> I have just finished making funeral arrangements. Now, I am going to sit down and respond to your ruling. The time for that ran yesterday. Does it seems [sic] reasonable to you to allow me an additional time to respond? I need that time and ask that you grant me ten days from today to respond to your ruling and the Motion for Summary Judgment and Sanctions. There are too many factual errors to raise at this time. I am only asking now that I be allowed additional time to respond.
> . . .

> Please give me the reasonable time I need to prove to Your Honor that a case does in fact exist and that there are real issues to go to the jury. Given the time, I will not lose the Motion for Summary Judgment and Sanctions. (emphasis added).

Having found that the letter should be construed as a motion for extension of time within which to ask the Court to reconsider its prior Order granting Summary Judgment to Defendants, the Court finds that such Motion should be denied. Plaintiff requests the additional time to challenge alleged errors made by this Court in its original Order granting Defendants' Motion for Summary Judgment, which was entered on March 29, 1996. In essence, Plaintiff seeks additional time in which to file a Motion to Alter or Amend the Judgment under Federal Rule of Civil Procedure 59(e), which provides such motion must be filed within ten days after entry of judgment.[1] This rule gives the plaintiff a ten-day window within which to file a motion. Under Federal Rule of Civil Procedure 6(b), a federal district court "may not extend the time for taking any action under . . . 59 (b)." Fed. R. Civ. Pro. 6(b).[2] As such, this Court is without authority to grant a motion for extension of time to file a motion to reconsider.

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[1] The Court assumes that Plaintiff is not seeking relief under Federal Rule of Civil Procedure 60(b) as he does not allege that there is new evidence, nor does he allege mistake, inadvertence or inexcusable neglect. *See* Fed. R. Civ. Pro. 60(b) ("On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, . . . excusable neglect, . . . newly discovered evidence", etc.). Rather, Plaintiff asserts that the Court failed to consider evidence that was attached to Defendants' original Motion.

[2] Plaintiff also requests that he be given additional time to respond to Defendants' Motion for Summary Judgment. However, as the Court has already ruled on the merits of Defendants' Motion, and as Plaintiff had made similar requests in the past which the Court also ruled on, it is unnecessary for the Court to consider this request.

Even assuming that this Court was vested which [with – sic] the authority to extend the time for filing a motion to reconsider, the Motion should nevertheless be denied. Throughout the pendency of these proceedings, Plaintiff has continuously engaged in dilatory tactics.[3] He continuously failed to respond to Defendants' Motion for Summary Judgment despite the fact that he was granted generous extensions of time for a variety of reasons. In fact, Plaintiff had approximately seven months to respond to Defendants' Motion, but failed to do so.[4] In his letter of April 10, 1996, requesting an extension for time, Plaintiff asserts that there are facts necessary for the Court's full consideration of the Motion for Summary Judgment that he has been unable to submit due to the death of his father. While the Court is sympathetic to Plaintiff's loss, such loss does not explain his repeated failure to respond as promised and to supply the Court with such information in the preceding seven months. Accordingly, Plaintiff's Motion for Extension of Time is DENIED.

In the event that Plaintiff's April 10, 1996, letter could be construed as a timely filed motion to reconsider, a conclusion which is not supported by the language of the letter, such motion would likewise be denied. In the letter, Plaintiff asserts that the Court erred in concluding that his action was barred by the statute of limitations because Judge Davis [sic] of the United States District Court for the Central District of California ("California District Court") concluded that his action was not barred. However, as noted in the original Order dismissing Plaintiff's suit, conclusions of the California

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[3] In addition to the repeated requests for extensions of time filed throughout the course of this litigation, (*see* Docket Entry Nos. 8, 15, 27, 35, 47, and 53), this Court's Courtroom Deputy has received a number of telephone calls from Plaintiff and Plaintiff's representatives requesting additional extensions of time in which to respond to the pending Motion for Summary Judgment.

[4] Plaintiff was well aware of the considerable length of time this Motion had been pending as evidenced by the Order by the Magistrate Judge of January 22, 1996, specifically directing him to file a motion for an extension of time to respond to Defendants' Motion for Summary Judgment, (*see* Docket Entry No. 44), and the numerous calls to this Court's Courtroom Deputy.

District Court do not have res judicata effect on this Court because the case was dismissed for lack of personal jurisdiction. *Cf. Ohio State Pharmaceutical Assoc. v. Creasy*, 587 F. Supp. 698, 704 (S.D. Ohio 1984). Moreover, the Court is still of the opinion that Plaintiff's RICO claim is barred. The statute of limitations for civil claims filed under RICO is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). Plaintiff filed this Complaint on August 3, 1994. As discussed in this Court's Order dismissing this cause of action, the latest date that the RICO limitations period could have begun to run is May 12, 1989, which means this action was not filed until approximately 15 months after the limitations period had expired. The Court recognizes that it is possible that Plaintiff's claim may have been tolled during the pendency of the matter in the California District Court from August 12, 1992, until December 12, 1992, as such action was ultimately dismissed for lack of personal jurisdiction.[5] *See Fox v. Eaton Corp.*, 615 F.2d 716, 719 (6th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981) (holding that, generally, filing in a court where it is unclear whether jurisdiction exists, tolls the statute of limitations).[6] However, the period during which Plaintiff's action was tolled is insufficient to bring the action within the limitations period and Plaintiff's claim is thus barred.

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[5] The California District Court did grant Plaintiff's Motion to Reconsider in part, but affirmed its original decision of December 12, 1992, dismissing Plaintiff's case for lack of jurisdiction. As such, the tolling period ended on December 12, 1992, the date that the case was dismissed.

[6] Plaintiff's action was not tolled during the period of August 12, 1991, to June 8, 1992, where it was dismissed for failure to effect timely service of the summons and the complaint, as Defendants did not receive adequate notice of the complaint. *See Herb v. Petcairn* [sic], 325 U.S. 77, 79 (1945) (holding that "when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to a final judgment without issuance of new initial process, it is enough to commence the action within the federal statute.").

As discussed above, this Court has already considered the merits of Plaintiff's claim that the Court erred in granting Defendants' Motion for Summary Judgment in the context of Plaintiff's Motion to Reconsider filed on April 22, 1996. Although the Court is of the opinion that its original decision was correct in denying Plaintiff's Motion to Reconsider on the merits, as noted by the Court of Appeals, this Court was without authority to grant Plaintiff an extension of time in which he could file a Motion to Reconsider. The Motion to Reconsider was filed on April 22, 1996, and, even under the most liberal reading of the Federal Rules of Civil Procedure, *see* Fed. R. Civ. Pro. 6 (a, e), the deadline for such motion expired on April 17, 1996. Accordingly, the Memorandum and Order entered July 30, 1996 (Docket Entry Nos. 63 and 64) are hereby VACATED.

For the foregoing reasons, the Court finds that Plaintiff's letter dated April 10, 1996, shall be treated as a Motion for an Extension of Time, and the Clerk is directed to docket the letter as such. Furthermore, the Court hereby DENIES Plaintiff's Motion for an Extension of Time.

/s/ ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 5-8-97 by /s/ S. Isom. (67)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3-94-0639
	)	JUDGE ECHOLS
FIRST AMERICAN NATIONAL BANK, *et al.*,	)	
	)	
	)	
Defendants.	)	

ORDER

Plaintiff filed this suit under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 ("RICO"), seeking to recover damages from Defendants based on allegations that Defendants joined together with the judge presiding over a prior civil suit between Plaintiff and Defendants to form an enterprise with the purpose of depriving Plaintiff of a fair and just trial. On August 31, 1995, Defendants filed a Motion for Summary Judgment (Docket Entry No. 23) and a Motion for Sanctions (Docket Entry No. 19). On March 29, 1996, this Court entered an Order (Docket Entry No. 55) which granted Defendants' Motion for Summary Judgment and granted the Motion for Sanctions to the extent that Plaintiff was prohibited from filing further lawsuits against Defendants arising from the facts upon which this suit is based without leave of Court. On April 12, 1996, the Court received a letter from Plaintiff dated April 10, 1996, which was not docketed, regarding the Court's ruling on Defendants' Motion for Summary Judgment and Motion for Sanctions. On April 22, 1996, Plaintiff filed a Motion to Reconsider (Docket Entry No. 57) which the Court denied on July 30, 1996

(Docket Entry No. 64). Plaintiff filed a Notice of Appeal on August 22, 1996 (Docket Entry No. 65).

On March 31, 1997, this Court received an Order (Docket Entry No. 66) entered by the United States Court of Appeals of the Sixth Circuit. In that Order, the Sixth Circuit remanded this case for a determination of whether the letter received by this Court on April 12, 1996, was sufficient to be treated as a motion to reconsider or whether it should have been treated as a motion for an extension of time. The Order also directed that, should the Court determine that the letter was sufficient to be a motion to reconsider or a motion for extension of time, such letter should be entered on the Court's docket sheet and a ruling made on the matter.

For the reasons stated in the Memorandum filed contemporaneously herewith, the Court finds that Plaintiff's letter dated April 10, 1996, shall be treated as a Motion for an Extension of Time, and the Clerk is directed to docket the letter as such. Furthermore, the Court hereby DENIES Plaintiff's Motion for Extension of Time. Finally, as the Court erroneously ruled on Plaintiff's Motion to Reconsider, the Memorandum and Order entered July 30, 1996 (Docket Entry Nos. 63 and 64) are hereby VACATED.

It is so ORDERED.

/s/ ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 5-8-97 by /s/ S. Isom. (68)

No. 96-6222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY,	)	FILED
	)	March 28, 1997
Plaintiff-Appellant,	)	Leonard Green
	)	Clerk
v.	)	
	)	ORDER
FIRST AMERICAN NATIONAL BANK;	)	
FIRST AMERICAN CORPORATION	)	
(TENN);	)	
DOES 1-100, INCLUSIVE,	)	
	)	
Defendants-Appellees.	)	

This court entered an order on February 3, 1997, directing the appellant to show cause why his appeal should not be dismissed for lack of jurisdiction. The order specifically stated that the motion for reconsideration filed on April 22 from the April 2, 1996, decision did not toll the appeal period. Appellant responded stating that the district court docket sheet does not reflect a letter that he mailed to the district court judge on April 10, 1996. Appellant argues that the district court must have granted his motion for an extension because the order of the district court denying the motion to reconsider did not state that it was filed late. Appellant also argues that the April 10, 1996, letter may be treated as a Fed. R. Civ. P. 59 or Fed. R. Civ. P. 60 motion.

The April 10, 1996, letter sought an extension of time to respond to the district court's decision. However, the district court lacks authority to extend the time for filing time-tolling motions. Fed. R. Civ. P. 6(b). No extension of time was granted by the district court. However, the April 10, 1996, letter did state that the appellant believed the court made its decision relying on an incorrect

statement of the facts and asked for additional time to develop matters for the court and respond to the district court's order.

It is ordered that the case is remanded to the district court for a determination whether the April 10, 1996, letter was sufficient to be treated as a motion to reconsider the decision of the district court or whether it should be treated as a request for an extension of time. If the district court determines that the letter should be treated as a motion for an extension of time or a motion to reconsider, it should be entered on the district court docket sheet and a ruling made on the matter.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk